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NO. 85-496

# In the Supreme Court of the United States

OCTOBER TERM, 1985

MOYE WAYNE WOOLARD,

Petitioner

versus

THE UNITED STATES OF AMERICA,

Respondent

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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28 pgs

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the post-trial discovery of false testimony fostered by the government requires a new trial where that false testimony relates to the credibility of the government's chief witness.

2. Whether the post-trial discovery of new evidence relating to the credibility of government witnesses requires a new trial where the original trial was a contest of credibility between the government witnesses and the defendant.

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IN THE SUPREME COURT OF THE UNITEDSTATES

October Term, 1985

MOYE WAYNE WOOLARD,

Petitioner

versus

THE UNITED STATES OF AMERICA,

Respondent

On Appeal from the Fifth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Comes now the Petitioner Moye Wayne Woolard, and submits this, his Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINION BELOW

The opinion of the Court of Appeals below (App. A, infra) was not reported. The opinion of the District Court below (App. B, infra) was not reported.

## JURISDICTION

The judgment of the Court below was entered on July 18, 1985. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. Sect. 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The fifth Amendment of the Constitution which provides that:

> *No person shall* be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor *be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation. (emphasis added).

## STATEMENT OF THE CASE

In May, 1983, the Petitioner was tried on two counts of perjury pursuant to 18 U.S.C. 1623; was convicted on one and acquitted on the other, Petitioner was sentenced on June 2, 1983, to five (5) years in prison and a $10,000.00 fine. The conviction was appealed; The Fifth Circuit affirmed the conviction in an opinion issued on March 23. The United States Supreme Court denied a writ of certiorari on June 4, 1984.

A motion for new trial based on newly discovered evidence was filed on December 5, 1984, and denied without a hearing on January 9, 1985 in an unpublished opinion. The Fifth Circuit affirmed the denial of the Motion for new Trial in an unpublished opinion.

On October 6, 1980, the Petitioner made a request under the Freedom of Information Act for the AIr Force Office of Special Investigations (AFOSI) file. See Exhibits A1, A2 and A3 in the Motion for New Trial (MNT hereafter). The Petitioner received a reply dated October 21, 1980, and that information contained numerous deletions.

On January 25, 1982, the Petitioner requested a second disclosure under the Freedom of Information Act. See Exhibit B1, MNT. In a reply dated February 9, 1982 the Petitioner received one file from AFOSI and was told that another file had not been completed. The request for that file had been referred to the Army and Air Force Exchange Services (AAFES). See Exhibits B3 and B4, MNT. The reply from AAFES stated that the file they had could not be released because it was an active file. See Exhibit B4, MNT. On March 26, 1982, the Petitioner appealed the denial on the release of information referred to in Exhibit B4, MNT. See Exhibit B5, MNT. In a letter dated May 3, 1982 the appeal was denied. See Exhibit B6, MNT.

In a letter dated August 25, 1983, the Petitioner again requested the release of files on him from AFOSI. See Exhibit C1, MNT. The Petitioner received a reply dated October 6, 1983 which contained information with numerous deletions. See Exhibit C2, MNT. In a reply dated the 18th of October, 1983, the Petitioner received some more information from AAFES. See Exhibit C3, MNT.

In the files received in October 1983, five months after the Petitioner's trial, was the following information:

a. In a period from January 8, 1981 to February 17, 1981 attorneys for Martin A. Taylor Company and Churchill Sales

Company, Inc., the two companies involved in the instant case, had communicaations with special agents at the AFOSI telling them that they would not recommend their clients provide informantion against the Petitioner unless there was some agreement concerning future civil action. See Exhibit C2-3, MNT.

b. On September 29, 1982, Martin Goodman spoke with an FBI agent, whose name was not revealed, concerning monies he allegedly paid the Petitioner. He declined to execute a sworn statement at that time and stated that if an agreement could be reached between his attorney and the Department of Defense then he would execute such a statement.See Exhibit C2-7, MNT.

c. On January 13, 1983, the attorney for Churchill Sales Company, Inc. advised AFOSI that he had no objections to Martin Goodman and Anthony Mazziotti giving sworn statements concerning their past payments to the Petitioner. See Exhibit C2-11, MNT.

d. Notes made apparently from conversations between Norman Epstein of AFOSI and Goodman and Mazziotti were included in the file. See Exhibits C2-12, C2-13, C2-14, MNT. This information is less than three pages of notes.

In the information dated October 18, 1983, there was a copy of a letter written to Mr. Platos Cacherios advising him that if Anthony Mazziotti and Martin Goodman would furnish affidavits of payments to the Petitioner, AAFES would not use those statements or any evidence relating to payments to the Petitioner to recover money or to institute a lawsuit to recover money from Mr. Mazziotti and Mr. Goodman. See Exhibit C3-1, MNT.

On June 18 and 19, 1984, a hearing was held at the AAFES headquarters concerning the Petitioner's appeal of his separation from AAFES. During that hearing the following informantion was learned:

a. Martin Goodman and Anthony Mazziotti were looking for some type of agreement concerning their civil liabilities before they would agree to testify or give information about the Petitioner. See Exhibits D11-D13, MNT.

b. Immunity from civil liability was discussed with Searcy L. Simpson, the U.S. Attorney involved in this case, Colonel Knowles of AAFES, Norman Epstein, and Dan Walker, the FBI case agent in the case, before any statements were signed. See Exhibits D1-D10, MNT. It was also learned in this hearing that the case against this Petitioner was the only one involved in the nation-wide investigation of the AAFES in which civil immunity was considered and given. See Exhibit D7, MNT.

The evidence presented by the Government on the Count on which the Petitioner was acquited consisted of

the testimony of one man, Martin A. Taylor; there were no prior statements or testimony to support his testimony, no documents to support his testimony, and no other witnesses to support his testimony. The evidence presented on the count on which the Petitioner was convicted consisted of the testimony of two witnesses, Martin Goodman and Anthony Mazziotti. Three months after the indictment was returned, Goodman and Mazziotti each signed a sworn statement which would later support their testimony. They had never given another statement concerening the Petitioner to anyone and had not testified before the grand jury. There were no documents to support their testimony. The only testimony Mazzoitti gave that directly supported Goodman's tesstimony was hearsay. In fact, seven of the thirteen pages of Mazziotti's direct examination contain hearsay. The Fifth Circuit, however, ruled that this hearsay was not eggregious enough to cause a reversal. The part of Mazziotti's testimony that was not hearsay was basically the same as Martin A. Taylor's on the second count. Martin Goodman's testimony was also very similar to that of Taylor's. Without (1) the statements discovered by Petitioner after the trial and (2) the hearsay testimony of Mazziotti, the evidence on the first count would not have been any more damaging that that presented on the second count. Had the Petitioner known about the signed statements by Goodman and Mazziotti and the reason those statements existed, the cross-examination of those two Government witnesses would have been significantly different, and the jury would have been exposed to significant impeachment evidence against Goodman and Mazziotti - evidence that did not exist against Taylor.

The U.S. Attorney's office knew about the civil immunity granted to Goodman and Mazziotti and sanctioned

such immunity. Such knowledge is admitted by the United States Attorney in his brief to the Fifth Circuit. The Government contends that this immunity had nothing to do with the prosecution of the Petitioner, that it only applied to an administrative hearing at AAFES. This contention completely ignores the fact that the plea bargain agreement these witnesses signed states that they will give truthful testimony in any trial, grand jury proceeding, or *administrative proceeding* (emphasis added). Assuming for the moment, however, that the statements were given only for the purpose of an AAFES hearing, the fact remains that the statements were used in the criminal prosecution of the Petitioner, and the reasons Goodman and Mazziotti gave those statements were vital to the jury's determination of their credibility during the trial. This information should have been given to the Petitioner pursuant to the Jenck's Act, 18 U.S.C. 3500, *Brady vs. Maryland*, 373 U.S. 83 (1963), and the Petitioner's motion to have the Government reveal all agreements between it and any witness which could have influenced that witness to testify.

The Petitioner, however, contends that these statements were not given strictly for administrative purposes at AAFES. If the infamous plea bargain agreement did actually protect Goodman and Mazziotti from prosecution on anything to do with the Petitioner, then it also compelled them to testify in the AAFES hearing. To believe the Government's contention, this Court also has to believe that Goodman and Mazziotti would have testified in the criminal trial but would not have given information to AAFES for its administrative purposes. The Testimony given by Goodman and Mazziotti was much more detailed than the statements given to AAFES and, of course, was given under oath. With the trial testimony available to it, AAFES would have had no need for the statements. It

takes no leap in logic to conclude that the granting of civil immunity to Goodman and Mazziotti had everything to do with their decision to testify against the Petitioner in his trial. Accordingly, the agreement to grant civil immunity should have been disclosed to the Petitioner before and during the trial. Not only did the Government fail to disclose the agreement, it also denied that the agreement existed. The Government's failure to inform the Petitioner of the agreement is an eggregious violation of the Petitioner's fundamental right to due process of law.

A conviction obtained through the use of false evidence known to be false by the government must fall as violative of basic Constitutional rights to due process. This principle is not changed by the fact that the false testimony went only to the credibility of a witness, *Napue vs. Illinois*, 360 U.S. 264, 269 (1959). A new trial must be held where (1) the government's case included false testimony, (2) the prosecutor knew or should have known of the falsehood, and (3) there is any reasonable likelihood that the false testimony would have affected the judgment, *United States vs. Antone*, 603 F.2d 566 (5th Cir. 1979). The Court, in *Antone, supra*, goes on to say that deliberate deception by the prosecution by the presentation of known false evidence is not compatible with the rudimentary demands of justice; this incompatibility exists even if the State does not solicit the testimony but allows it to go uncorrected.

The Petitioner had filed a motion prior to trial asking for all agreements the United States had made with any witness which could have influenced that person to testify and for all Jencks Act materials. See Exhibit E12, MNT. The Plea Bargain Agreement dated April 19, 1980, is the only information that was released from the United States

to the Petitioner regarding this matter. See Exhibit E13, MNT. There was never any hint of any immunity, indeed any discussion, with the witnesses concerning their civil liabilities in this matter even though the defense cross-examined extensively concerning the witnesses' inducements to testify. See Exhibits E14-18, MNT. Indeed the U.S. attorney argued that the deal had already been made before the Petitioner's name was mentioned in the discussions with Goodman and Mazziotti and implied that the witnesses had nothing to gain from testifying against their friend. See Exhibit E11, MNT. It is obvious from the information learned during the hearing at AAFES and the information received under the Freedom of Information Act that the United States did not have a case against the Petitioner in regards to Churchill Sales Company, Inc. until Goodman and Mazziotti signed sworn statements on January 18, 1983, three months after the indictment was returned and less than a month before the first trial setting. The two men had talked to the government prior to that date and had refused to give sworn statements until then. Obviously the statements were given because the civil immunity was granted to Goodman and Mazziotti. Without these statements and without the testimony of Goodman and Mazziotti the United States would have had no evidence to present against the Petitioner in this trial. The fact that this was the only case in which civil immunity was considered emphasizes the point that the United States was grasping at straws to try to get evidence to present against this Petitioner.

Where a conviction is not obtained by the knowing use of false testimony by the prosecution, the test for granting a new trial based on newly discovered evidence under Rule 33 of the Federal Rules of Criminal Procedure is the following:

1. the evidence must be newly discovered and unknown at the time of trial;

2. the evidence must be material, not merely cumulative or impeaching;

3. the evidence must be such that it would probably produce an acquittal; and

4. the failure to learn of the evidence is not due to the lack of diligence by the Defendant.

See *Antone, supra.*

The Petitioner in this case filed a Motion to Require Prosecution to Reveal Any Agreement Entered Into between the United States and Prosecution Witness That Could Conceivably Influence His Testimony. See Exhibit E12, MNT. Petitioner also filed a Motion for Discovery and Inspection of Evidence which included a request for any Brady material including evidence which could be used for impeachment. See Exhibit E23, MNT. Both motions were granted.

The only evidence turned over by the United States in response to those motions was a plea-bargain agreement. See Exhibit E13, MNT. The Petitioner vigorously cross-examined the witnesses at the trial in an effort to learn of any reasons that compelled them to testify against the Petitioner. They steadfastly insisted that the plea-bargain agreement was all that existed. See Exhibits E14-18, MNT. The Petitioner requested a copy of the FBI agent's Grand Jury testimony. See Exhibits E19-22, MNT. That request

was denied. Prior to trial the Petitioner made several requests for release of information under the Freedom of Information Act. The information needed for the trial was not released until after the trial. Obviously this evidence was unknown at the time of trial though the Petitioner sought vigorously to obtain it prior to trial. No argument can be made concerning a lack of diligence on the part of this Petitioner in trying to obtain the information.

The newly discovered evidence presented in this writ cannot be considered merely cumulative or impeaching. The evidence shows how very little the government had against the Petitioner, and that, in fact, it had nothing against the Petitioner in this case until immunity from civil liability was promised to the witnesses. When a trial boils down to a credibility contest between the Defendant and the Government's witness, evidence of this sort is not considered merely cumulative or impeaching, *Blankenship vs. Estelle*, 545 F.2d 510 (5th Cir. 1977). When there is evidence which shows that a witness might be dishonest, evidence that that witness is promised immunity is not considered cumulative, *United States v. Sanfilippo*, 564 F.2d 176 (5th. Cir. 1977). In *Sanfilippo, supra*, the government witness' testimony affirmatively linked the Defendent to the contraband, and belief in his testimony was crucial as a necessary link in the chain of proof. The fact that he was promised immunity was not considered merely cumulative evidence.

False evidence was presented to the jury in this trial. To say that the civil immunity had nothing to do with the criminal prosecution of the Petitioner is to ignore common sense, the wording of the plea bargain agreement, and the facts that Goodman himself and both Goodman and Mazziotti through their attorney had refused to give any sworn

statement against the Petitioner until civil immunity was granted. Even if this Court were to find that the United States Attorney did not solicit false evidence and did not intentionally keep such vital impeaching evidence from the Petitioner, the fact remains that the information was kept from him and from the jury that decided both counts. Upon the retrial of this cause, the jury would hear testimony very similar to that heard on the Martin A. Taylor count, but with significantly more impeaching evidence. In all probability, the jury would return a verdict of not guilty on this count.

## SIGNIFICANCE OF QUESTIONS RAISED AND REASONS FOR ALLOWANCE OF WRIT

In affirming the denial of the Motion for New Trial, the Fifth Circuit has completely ignored the facts, and in so doing, has committed a grave injustice against Petitioner. In its opinion, the Fifth Circuit ignored the facts (1) that the two Government witnesses had refused to give *any* sworn statement to *anyone* about the Petitioner until civil immunity was granted, (2) that if the plea agreement did actually cover the criminal prosecution of the Petitioner it also covered any administrative hearings concerning the Petitioner, and (3) that the Government witnesses had not been offered civil immunity in any other case, and apparently, civil immunity had never been offered in any other case, *inter alia.* The Fifth Circuit even went so far as to deny that the revelation of the civil immunity would have had *any* impeaching effect on the testimony of Goodman and Mazziotti (see page 5 of its opinion)!

In their dealings with the District Court and the

Fifth Circuit on the subject Motion for New Trial, the Petitioner's attorneys have felt like they have been writing on one case while the Courts have been deciding another case. The contentions advanced by the Petitioner in his Motion for New Trial have never been fully, or even adequately, examined and discussed by the Courts. This is a situation where the Supreme Court badly needs to exercise its powers of review and supervision so that this Petitioner can at least have his case determined fairly after a thorough examination of the facts.

## CONCLUSION

Upon the foregoing facts and for these reasons Appellant respectfully requests that the foregoing Petition be granted.

Respectfully submitted,

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COUNSEL FOR PETITIONER

## CERTIFICATE OF SERVICE

I certify that two copies of the foregoing Petition for Writ of Certiorari have been served upon oposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto this the 13th day of September, 1985.

FRANK JACKSON

## APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 85-1039
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MOYE WAYNE WOOLARD,

Defendant-Appellant.

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Appeal from the United States District Court
for the Northern District of Texas

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( July 18, 1985 )

Before WILLIAMS, JOLLY, and HILL, Circuit Judges.

PER CURIAM:*

Moye Wayne Wollard was convicted on one count of making false declarations to a grand jury in violation of 18 U.S.C. §1623. His conviction was affirmed by this Court. *United States v. Woolard,* No. 83-1392 (5th. Cir. Apr. 25, 1984) (unpublished). Woolard then filed a motion for new

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*Local Rule 4.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

trial in the district court on the ground of newly discovered evidence. *See* Fed. R. Crim. P. 33. Woolard appeals the denial of that motion. We affirm.

In 1980, Woolard, an executive in the Army and Air Force Exchange Service (AAFES) was suspected of taking undisclosed gifts from Martin Goodman and Anthony Mazziotti, sales representatives for Churchill Sales. Co. (Churchill) which supplied goods to AAFES. Woolard told a grand jury investigating the charges that he had received nothing of value from Goodman or Mazziotti between 1963 and 1974. In Woolard's perjury trial that followed, both Goodman and Mazziotti testified that they had "paid off" Woolard with gifts of, among other things, cash and entertainment. The Government obtained this testimony by entering into a plea agreement with Churchill. The agreement required the company to plead guilty to a charge of bribery and granted the company and its officers and employees immunity from further criminal charges in return for their testimony. The agreement was made on April 10, 1980. The jury returned a verdict of guilty on one count.

Not until after his trial did Woolard discover that Goodman and Mazziotti had entered into another agreement with AAFES prior to trial. This AAFES agreement required Goodman and Mazziotti to provide affidavits recounting their payments to Woolard in return for a promise by AAFES not to use that information in any suit to recover money from Goodman, Mazziotti or Churchill. AAFES desired the information so that it could terminate Woolard's employment. The agreement made no reference to trial testimony. This agreement was reached on January 18, 1983, shortly before Woolard's criminal trial which

began on May 2, 1983. It was evidence of this agreement that Woolard brought forward as the basis for his motion for a new trial.

II.

Woolard challenges the denial of his motion for new trial on two grounds. He contends that the Government knowingly presented false testimony, thus violating his right to a fair trial. Alternatively, Woolard contends that the newly discovered evidence of the agreement with AAFES merits a new trial. We reject both contentions.

A.

A motion for new trial under Fed. R. Crim. P. 33 is addressed to the discretion of the district court and denial will only be reversed for an abuse of that discretion. *United States v. Lauga*, 726 F.2d 1032, 1035 (5th Cir. 1984). Ordinarily, in order to prevail on a Rule 33 motion, a defendant must show the following:

(1) that the evidence was newly discovered and was unknown to the defendants at the time of the trial;

(2) that the evidence was material, not merely cumulative or impeaching;

(3) that it would probably produce an acquittal; and

(4) that failure to learn of the evidence was due to no lack of diligence on the part of the defendants.

*United States v. Antone*, 603 F.2d 566, 568-69 (5th Cir. 1979) (quoting *United States v. Rachal*, 473 F.2d 1338, 1343 (5th Cir.), *cert. denied*, 412 U.S. 927 (1973)). However, an exception to this required showing exists: when the Government's case included false testimony and the prosecution knew or should have known of the falsehood, a new trial must be granted if there was "any reasonable likelihood that the false testimony would have affected the judgment of the jury." *Id.* at 569.

Woolard's first contention fails because he has brought to our attention no false evidence that was presented at trial. the Government failed to reveal the AAFES agreement to Woolard prior to trial. That is all.[1] Neither Goodman nor Mazziotti denied during his testimony, implicitly or explicitly, that he had entered into any agreement other than the plea bargain nor was either witness ever asked, by either side, about the existence of any other agreement or inducement to testify. We have found in the record no question propounded at trial that required Goodman or Mazziotti to mention the AAFES agreement. Finally, since that agreement was made three years after Goodman and Mazziotti had agreed to testify,

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[1]Woolard raises no claim under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), concerning the Government's failure to reveal exculpatory evidence. Woolard's failure to raise the issue was well-advised since suppressed impeachment evidence "must have a definite impact on the credibility of . . . [a] prosecution witness in order for the nondisclosure to require reversal." *United States v. Gaston*, 608 F.2d 607 (5th Cir. 1979) (quoting *Calley v. Callaway, 519 F.2d 184, 222 (5th Cir. 1975) (en banc), cert.denied*, 425 U.S. 911 (1976)). For the reasons stated in the text, *infra*, the AAFES agreement could have had no such impact on Goodman's or Mazziotti's credibility. It cannot be said that the "undisclosed evidence 'probably would have resulted in an acquittal.'" *Ogle v. Estelle, 641 F.2d 1122, 1125 (5th Cir. 1981) (quoting United States v. Anderson*, 574 F.2d 1347, 1354 (5th Cir. 1978)).

made no mention of trial testimony, and was purely an agreement with AAFES, which is neither a government prosecutorial arm nor a law enforcement agency, it cannot be said to have been an inducement to testify at the criminal trial. Thus, it could not even be said to affect their credibility. Accordingly, the cross-examination of Goodman and Mazziotti regarding inducement to testify did not even indirectly require the revelation of the AAFES agreement. Woolard's first challenge must fail. *Cf. United States v. Sanfilippo*, 564 F.2d 176, 178 (5th Cir. 1977) (prosecutor's knowing failure to prevent perjured testimony of prosecution witness concerning prior plea agreement violated due process and merited new trial).

B.

Our discussion of Woolard's first challenge disposes of his second challenge as well. To justify granting a new trial newly discovered evidence must be "material, not merely cumulative or impeaching." *United States v. Antone*, 603 F.2d at 569. Woolard argues only that the evidence of the AAFES agreement calls into question the credibility of Goodman and Mazziotti. We concluded above that it would not even have had this effect. Despite the fact that the credibility of Goodman and Mazziotti was an important issue at trial, the newly discovered evidence was, at most, impeaching and such cannot merit a new trial. *Id; see also Casey v. United States*, 522 F.2d 206, 207 (5th Cir. 1975), *cert. denied, 426 U.S. 909 (1976) (newly discovered evidence of prior agreement between prosecutor and key prosecution witness was merely impeaching and would not merit new trial); United States v. Jacquillon*, 469 F.2d 380, 388 (5th Cir. 1972) (impeachment evidence did not merit new trial), *cert. denied*, 410 U.S. 938 (1973); *cf. Blankenship v. Estelle*, 545 F.2d 510, 513-14 (5th Cir. 1977) (prosecution witness's perjured testimony at trial that he had made no

prior agreement with the prosecution, which testimony "left the erroneous impression of an impending trial and the absence of leniency as an inducement to testify" and was "highly misleading" merited new trial), *appeal after remand*, 592 F.2d 270 (5th Cir.), *cert. denied*, 44 U.S. 856 (1979).

Even if the evidence were not merely impeaching, we could not say that it would, as it must in order to merit a new trial, "probably produce an acquittal." *United States v. Antone*, 603 F.2d at 569. To support his argument to the contrary Woolard contends that the Government's case in a new trial would be weaker because "[t]he most damaging portion of Anthony Mazziotti's testimony has been ruled hearsay by this Court" in its prior affirmance of his conviction. In Woolard's view, the retrial would be a credibility contest between himself and Goodman. Woolard's account of this Court's ruling on appeal, however, is inaccurate. This Court noted that while some of Mazziott's testimony was hearsay, Woolard suffered no prejudice as a result of that testsimony since Goodman, the declarant, had testified to the same facts from personal knowledge. *United States v. Woolard* at 3. On the other hand, some of Mazziotti's testimony was not hearsay and was quite damaging. He testified that he made some payoffs to Woolard in the form of entertainment, such as expensive dinners and football tickets. He also stated that he witnessed Goodman giving Woolard a $3,500 payment. Mazziotti also testified that he gave Goodman money for payment to Woolard. The only hearsay statements discussed by this Court were Mazziotti's statements that Goodman in fact subsequently made the payments to Woolard. Thus, much of Mazziotti's most damaging testimony would be available in a retrail.

Woolard's overestimation of the value of the AAFES agreement as impeachment evidence is matched only by his underestimation of the extent to which Mazziotti's nonhearsay testimony damaged his defense. It is clear that the new evidence would have little effect on the verdict were we to order a new trial. Woolard's second challenge must therefore fail.

For these reasons the district court's denial of the motion for new trial is AFFIRMED.

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Filed Jan 9, 1985

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | § | |
| | § | |
| Plaintiff, | § | |
| | § | |
| vs. | § | CR 3-82-307-R |
| | § | |
| MOYE WAYNE WOOLARD, | § | |
| | § | |
| Defendant. | § | |
| | § | |

**ORDER**

This Court has studied the defendants's Motion for a New Trial Based on Newly Discovered Evidence and the voluminous material attached to that motion. For the following reasons, the Motion for New Trial is DENIED.

1. The primary "new evidence" upon which the defendant relies is information that the witnesses Mazziotti and Goodman would not cooperate with the Government unless they received immunity from civil liability as well as criminal prosecutiom. However, these witnesses were cross-examined extensively at trial concerning their plea agreements in the criminal matters. It is obvious that:

> (i) the supposed newly discovered evidence about "immunity from civil liability" would have been merely cumulative of the impeachment which was done at great lengths by defense counsel upon the basis of the criminal plea agreement;

(ii) this supposed newly discovered evidence would not have produced an acquittal.

2. The claim that the Fifth Circuit held that "much of Anthony Maziotti's testimony was hearsay and should not have been admitted during the trial" -- and that in any new trial "there would be little, if any, testimony obtained from Anthony Mazziotti," and the only evidence left would be Martin Goodman's word against the defendant's word" -- is simply not true. The Fifth Circuit held:

> "At the trial the witness Mazziotti testified that he gave to his partner Goodman half of the cash payments to be made to Woolard. Mazziotti went further and testified that these transfers of cash were made by Goodman to Woolard, which was hearsay. However, *the declarant Goodman testified personally about the transfers.* There was no confusion before the jury or prejudice to Woolard about what Mazziotti did or did not personally observe."

Goodman testified that "he made many gifts to Woolard during "the years 1963-1974. Mazziotti testimony that he gave half of these cash payments to Goodman supported Goodman's testimony. The defendant Woolard denied receipt of any significant gifts. The jury believed Goodman. Accordingly, the conviction was proper -- just as the Fifth Circuit held -- and the Motion for New Trial is DENIED.

SIGNED this 9th day of January, 1985.

/s/Jerry Buchmeyer

UNITED STATES DISTRICT JUDGE
JERRY BUCHMEYER